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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY JESUS BARAJAS,

Defendant and Appellant.

E070588

(Super.Ct.No. RIF1770040)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Affirmed in part; reversed in part with directions.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rudy Jesus Barajas used a knife to kill his neighbor's dog named Devo, after Devo killed Spunky, a dog who belonged to Barajas's family. A jury convicted Barajas of two felony counts of animal cruelty, one pursuant to Penal Code<sup>1</sup> section 597, subdivision (a) (count 1), and the second pursuant to section 597, subdivision (b) (count 2). The jury further found that Barajas personally used a knife in the commission of both offenses (§ 12022, subd. (b)(1)). The trial court granted Barajas probation.

In this appeal, Barajas contends: (1) the trial court improperly abused its discretion by excluding the testimony of four defense witnesses regarding other incidents of Devo acting aggressively toward people and animals; (2) probation conditions requiring Barajas to obtain prior approval of his residence from his probation officer should be stricken as unconstitutionally overbroad; and (3) his conviction on count 2 must be reversed because he may not be convicted under both subdivisions (a) and (b) of section 597, since both counts arise from the same act.

We find as follows: (1) the trial court did not abuse its discretion by excluding the defense witnesses; (2) the residence approval probation conditions must be modified; and (3) the conviction on count 2 must be reversed, because both count 1 and count 2 arise from the same act (the People concede this point). We therefore reverse the judgment

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

with respect to count 2, modify the residence approval probation conditions, and otherwise affirm the judgment.

## I. BACKGROUND

Barajas lived in Riverside with his family and a number of pets, including a dog named Spunky, who weighed four or five pounds. The neighbor across the street owned Devo, a dog who weighed 80 or 90 pounds. At trial, witnesses offered varying accounts of exactly what happened—and Barajas’s own statements to police differ substantially from his testimony at trial—but it is undisputed that on December 24, 2016, Devo attacked and killed Spunky outside Barajas’s house. While Spunky was still in Devo’s mouth, Barajas grabbed Devo in a chokehold. Shortly after Devo dropped Spunky, Barajas retrieved a knife from his kitchen and used it to cut Devo’s neck. Devo then returned to his house, and soon bled to death from the cut.

Prior to trial, Barajas requested permission to call nine witnesses regarding Devo’s prior history of aggression toward animals and humans. He also sought to call an animal control officer who had responded to a complaint about Devo being loose in the neighborhood and acting aggressively. He contended that this evidence supported his claim that he killed Devo “in self-defense, defense of others, and defense of property.”

The trial court ruled that it would admit the testimony of the animal control officer, any witness who was bitten by Devo, three witnesses of the defense’s choosing who had witnessed Devo attacking another animal, and two witnesses chosen by the defense regarding “efforts by the . . . neighborhood to cause the owners” to keep Devo

contained, or lack of compliance with reasonable requests to that effect. The court placed no limits on Barajas's testimony about his knowledge of Devo's past history of aggression and getting loose in the neighborhood.

Ultimately, Barajas, five witnesses from the neighborhood, and the animal control officer testified at trial regarding Devo's prior behavior. Their testimony cumulatively established that Devo had gotten loose in the neighborhood on multiple occasions, and that he had bitten one person (a 10-year-old child) and four other animals (three dogs and one cat). Barajas testified that he was aware of Devo biting one person and "about three" animals, and that Devo's owners "had issues keeping the dog restrained and inside their yard." The animal control officer testified about a verbal warning he gave Devo's owners about what could happen if Devo continued to get loose in the neighborhood and was involved in an attack.

Four of Barajas's proffered witnesses were excluded. Based on the defense's offer of proof, their testimony collectively would have added that Devo had attacked a fourth dog, and that he had acted aggressively toward several people whom he did not actually bite, including by growling and staring as if he were about to attack.

The jury returned guilty verdicts on both charged counts, and found true enhancement allegations relating to Barajas's personal use of a knife. The trial court granted Barajas 36 months' probation, with 176 days to be served in a work release

program.<sup>2</sup> The trial court indicated that it would reduce the felony convictions to misdemeanors if he successfully completed two years of probation without any violations.

Barajas's probation conditions included the following residency approval requirements: "Inform the probation officer of your place of residence and reside at a residence approved by the probation officer.[¶] Give written notice to the probation officer 24 hours before changing your residence and do not move without the approval of the probation officer."

## II. DISCUSSION

### A. *Cumulative Evidence*

Barajas contends that the trial court abused its discretion by excluding the testimony of four defense witnesses, who would have provided additional testimony regarding Devo's aggressive behavior. We find no abuse of discretion.

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<sup>2</sup> There is an apparent typographical error in the reporter's transcript where it shows the trial court saying that defendant is to "serve *108* days custody of Riverside County Sheriff," with four days of credit for time served, and the balance to be served on work release. (Italics added.) The trial court expressly indicated that its intention was to grant probation on terms Barajas had previously agreed to by signing a sentencing memorandum. That sentencing memorandum states that the custody term is to be *180* days in custody, with four days credit for time served, resulting in the balance of 176 days to be served on work release. Defendant has not argued here that the reporter's transcript error has caused prejudice, instead stating that Barajas "was granted formal probation for a period of 36 months, with 176 days to be served in a work release program."

Evidence Code section 352 allows the trial court to limit relevant evidence if it is cumulative or time wasting. (Evid. Code, § 352 [court “in its discretion” may exclude otherwise admissible evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time . . . .”]; see *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843-1844.) We review the trial court’s evidentiary rulings under the deferential abuse of discretion standard. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1366-1367.) We will disturb the trial court’s ruling only if the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

We find nothing arbitrary, capricious or patently absurd about the trial court’s decision to limit the defense to five witnesses, instead of nine, to testify about Devo’s previous aggressive behavior and his owner’s inability to keep him from getting loose in the neighborhood. The defense was granted ample leeway to establish that Devo was dangerous to both animals and humans when he got out of his yard. None of the excluded witnesses could have testified that they were attacked by Devo; any such witnesses were allowed to testify, and one (a 10-year-old child) did testify. Testimony from three other witnesses, who were prepared to testify that Devo had acted in a manner that made them afraid he was about to attack them (though he ultimately did not), or establishing that Devo had actually attacked four dogs, instead of three, would have been of little additional probative value. It was well within the bounds of reason for the trial

court to conclude that any marginal probative value of the excluded testimony was outweighed by the probability of “undue consumption of time.” (Evid. Code, § 352, subd. (a).) Barajas has not demonstrated the trial court erred in its evidentiary rulings.<sup>3</sup>

*B. Residency Approval Probation Conditions*

Barajas argues that the residency approval probation conditions should be stricken because they are unconstitutionally overbroad and violate his right to travel and freedom of association. The People argue Barajas forfeited the issue by failing to object in the trial court and, in the alternative, argue the conditions are narrowly tailored. We conclude the issue is not forfeited, and the conditions should be modified.

Where a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a pure question of law, which is not forfeited by failure to raise it in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889; *People v. Welch* (1993) 5 Cal.4th 228, 235.) Here, we find defendant’s claim of error was not forfeited, because it presents a “pure question[] of law” turning on undisputed facts. (*People v. Welch, supra*, at p. 235.) Moreover, the challenged probation condition can easily be remedied on appeal by modification. (See *In re Sheena K., supra*, at p. 888.) It therefore “does not appear

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<sup>3</sup> Moreover, we find it highly unlikely evidence of such limited probative value would have changed the jury’s conclusions in any respect, so any error was harmless. (*People v. Clark, supra*, 63 Cal.4th at p. 572.)

legally imperative, practical, or wise to extend the forfeiture rule” to Barajas’s constitutional challenge. (*Ibid.*)

Probation conditions impinging on “constitutional rights ‘must be narrowly drawn’” so that they are reasonably related to the state’s interest in reformation and rehabilitation. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 627.) Residency approval probation conditions have sometimes been upheld as constitutional. For example, in *People v. Stapleton* (2017) 9 Cal.App.5th 989, the Court of Appeal upheld substantively identical residency approval conditions, where the defendant had pleaded guilty to petty theft, was required to register as a sex offender, and had a history of mental health issues and substance abuse. (*Id.* at pp. 992, 995.) In those circumstances, the Court of Appeal found that the residency approval condition “may directly affect his rehabilitation” as he could, for example, “opt to live in a residence where drugs are used or sold.” (*Id.* at pp. 995-996.)

The present case is distinguishable. The People contend the residency approval conditions are necessary “to prevent [Barajas] from coming into contact with the witnesses in this case and from residing with pets for a year . . . .” Other, unchallenged probation conditions, however, expressly prohibit Barajas from residing with pets, and prohibit him from coming into direct or indirect contact with certain witnesses in this case, including Devo’s owner, her sister, and the other neighbor who witnessed the events giving rise to Barajas’s charges and who testified against him. No doubt, it is important for the probation officer to know where Barajas is living to enforce these, and other,



probation conditions. But we are not persuaded that the probation officer's advance approval of Barajas's residence is reasonably necessary to do so, or otherwise would have any foreseeable effect on his rehabilitation.

We have the power to modify a probation condition on appeal. (See *In re Sheena K.*, *supra*, Cal.4th at pp. 888, 892.) We therefore will order the conditions at issue modified to read as follows: "Keep the probation officer informed of your place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence."

### C. Section 597

The jury found Barajas guilty of one count of cruelty to animals in violation of section 597, subdivision (a), and a second count of cruelty to animals in violation of section 597, subdivision (b). It is undisputed that both counts 1 and 2 were based on the single act of Barajas using a knife to kill Devo. In *People v. Tom* (2018) 22 Cal.App.5th 250, the Court of Appeal held that a defendant cannot be convicted of violating both subdivisions (a) and (b) of section 597 based on a single act.<sup>4</sup> (*Id.* at pp. 252, 258) We find the reasoning in support of this holding persuasive, and the People concede that Barajas's conviction on count 2 should be reversed. We agree.

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<sup>4</sup> The conduct prohibited by subdivisions (a) and (b) of section 597 overlaps; subdivision (a) "applies to intentional acts while subdivision (b) . . . applies to conduct resulting from criminal negligence." (*People v. Tom*, *supra*, 22 Cal.App.5th at p. 256.)

### III. DISPOSITION

The judgment is reversed with respect to count 2. The condition of probation regarding Barajas's residence is modified to read as follows: "Keep the probation officer informed of your place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence." In all other respects, the judgment is affirmed.

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RAPHAEL

J.

We concur:

MILLER

Acting P. J.

FIELDS

J.